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April 22, 2004

Mr. Bruce F. Duke
Deputy Executive Commissioner
South Carolina Public Service Commission
101 Executive Drive
Columbia, SC 29211

Re: Petition for Arbitration of US LEC of South Carolina Inc. to resolve dispute with BellSouth Telecommunications
Docket No. 2004-0078-C

Dear Mr. Duke:

Enclosed for filing with the Commission, please find twenty-five copies of the Prefiled Direct Testimony of Frank Hoffman and Wanda Montano. I have served all counsel of record by email and regular copies of the testimony.

With best regards, I am

Sincerely,

Faye A. Flowers

Faye A. Flowers

FAF:cs

cc: Terry Romine, Esquire – Via Email to *tromine@uslec.com*
Florence P. Belser, Esquire – Via Email to *florence.belser@psc.state.sc.us*
Patrick W. Turner, Esquire – Via Email to *patrick.turner@bellsouth.com*

BEFORE THE
PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA

IN RE: Petition of US LEC of South Carolina Inc. For Arbitration of an Amendment to an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act Of 1934, as Amended	))))))	Docket No. 2004-78-C

DIRECT TESTIMONY OF

WANDA G. MONTANO

ON BEHALF OF US LEC SOUTH CAROLINA INC.

Q: PLEASE STATE YOUR NAME, TITLE, AND BUSINESS ADDRESS FOR THE RECORD.

A: My name is Wanda G. Montano. I am currently Vice President, Regulatory and Industry Affairs for US LEC Corp., the parent company of US LEC of South Carolina Inc. ("US LEC"), and its operating subsidiaries, including the Petitioner in this proceeding. My business address is 6801 Morrison Boulevard, Charlotte, North Carolina 28211.

Q: PLEASE DESCRIBE YOUR RESPONSIBILITIES FOR US LEC.

A: I am responsible for the management of US LEC's relationships with state and federal agencies who oversee our business, as well as for US LEC's relationships with incumbent local exchange carriers ("ILECs"), competitive local exchange carriers ("CLECs"), independent telephone companies ("ICOs"), and wireless companies.

Q: PLEASE SUMMARIZE YOUR EDUCATIONAL BACKGROUND AND PROFESSIONAL EXPERIENCE.

A: I joined US LEC in January 2000. Prior to that, I was employed in various positions by Teleport Communications Groups ("TCG") and then by AT&T following AT&T's acquisition of TCG. In 1998-1999, I served as General

Manager for North and South Carolina (Sales Executive) for AT&T (Charlotte, NC). During 1997 – 1998 I was Vice President & Managing Executive for North & South Carolina (Sales and Operation Executive) for TCG (Charlotte, NC). During 1995-1997, I was Director of Process Reengineering for TCG (Staten Island, NY). During 1992-1994, I was Director of Marketing for TCG (Staten Island, NY). During 1990-1992, I was Senior Product Manager for Graphnet (Teaneck, NJ). From 1982 – 1990, I was Regulatory Manager for Sprint Communications Corp. in Reston, Virginia and, from 1979 – 1982, I was a paralegal for GTE Service Corporate in Washington, D.C. I have a B.S. from East Carolina University in Greenville, NC (1974). I received my Paralegal Certificate from the University of Maryland in 1980 and I received my M.B.A. in Marketing & Government Affairs from Marymount University of Virginia in 1988.

Q: HAVE YOU PREVIOUSLY TESTIFIED BEFORE THE SOUTH CAROLINA COMMISSION?

A: No. I have testified before the North Carolina Utilities Commission, the New York Public Service Commission, the Florida Public Service Commission, the Maryland Public Service Commission, the Pennsylvania Public Utility Commission, and the Georgia Public Service Commission.

Q: HAVE YOU PARTICIPATED IN US LEC'S INTERCONNECTION NEGOTIATIONS WITH BELLSOUTH, INCLUDING THE NEGOTIATIONS OF THE SO-CALLED TRO AMENDMENT?

A: Yes, I have participated in the negotiating sessions. In addition, I have reviewed the points of contention raised during the negotiations to ensure their consistency with state and federal requirements and policy.

Q: WHAT IS THE PURPOSE OF YOUR TESTIMONY?

The purpose of my testimony is to explain what I understand to be the legal and competitive policy arguments in support of US LEC's position on the statutes, regulations or other laws that govern BellSouth's obligation to provide unbundled network elements to US LEC (Issue A-1); the implementation of the vacatur by the D.C. Circuit Court of Appeal's decision under the Interconnection Agreement and the need for a more expansive transition period than proposed by BellSouth (Issue A-5); the commingling of unbundled network elements obtained pursuant to 251 and unbundled network elements obtained pursuant to 271 (Issue A-7); and the FCC's authority to require BellSouth to commingle or combine services other than telecommunications services with unbundled network elements (Issue A-8).

ISSUE A-1: WHAT STATUTES, REGULATIONS OR OTHER LAWS, RULES AND REGULATIONS GOVERN BELLSOUTH'S OBLIGATION TO PROVIDE UNBUNDLED NETWORK ELEMENTS UNDER THIS AGREEMENT (SECTION 1.1)

Q: PLEASE EXPLAIN HOW US LEC'S POSITION DIFFERS FROM BELLSOUTH'S.

A: US LEC believes that BellSouth's obligations to provide access to unbundled network elements ("UNEs") and combinations of UNEs under the parties' interconnection agreement is governed by Section 251(c)(3) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (47 U.S.C. § 151, *et. seq.*) ("Act"), 47 C.F.R. Part 51 ("FCC Rules Part 51) or as otherwise required by the Commission pursuant to 252(e)(3) of the Act (47 U.S.C. § 2512(e)(3)). BellSouth's position is that only Section 251(c)(3) of the Act (47 U.S.C. § 251(c)(3)) governs its obligations to provide UNEs and combination of UNEs pursuant to Attachment 2 to the parties' interconnection agreement.

Additionally, US LEC believes that should either a court of competent jurisdiction, such as the D.C. Circuit Court of Appeals or the Supreme Court, or the FCC or this Commission relieve BellSouth of its obligation to make available access to a UNE or combination of UNEs, BellSouth, as a Regional Bell

Operating Company ("RBOC"), continues to have an obligation to provide access to certain UNEs under the terms of the Interconnection Agreement pursuant to Section 271 of the Act (47 U.S.C. § 271). I will discuss further the obligations of BellSouth to provide access to certain UNEs under Section 271 when I discuss US LEC's position on the transition requirements, Issue A-5. US LEC agrees that if access to UNEs is made available pursuant to Section 271 of the Act, then BellSouth and US LEC may need to negotiate the rates for such UNEs as BellSouth is not obligated to provide such UNEs at TELRIC-based pricing.

BellSouth disputes US LEC's position that this Commission has authority to require access to UNEs under Section 252(e)(3) of the Act or that the interconnection agreement should include reference or incorporate terms, conditions and rates for UNE access pursuant to Section 271 of the Act.

Q: WHY IS SECTION 252(e)(3) OF THE ACT AN APPROPRIATE CITATION IN CONNECTION WITH BELLSOUTH'S OBLIGATION TO PROVIDE UNEs UNDER THE INTERCONNECTION AGREEMENT?

A: In the so-called "*Triennial Review Order*" (the *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking* adopted by the FCC on February 20, 2003, released on August 21, 2003, and effective on October 2, 2003 in CC Docket No. 01-338 (Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers), CC Docket No. 96-98 (Implementation of

the Local Competition Provisions of the Telecommunications Act of 1996) and CC Docket No. 98-147 (Deployment of Wireline Services Offering Advanced Telecommunications Capability.)), the FCC found a clear Congressional directive in Section 252(e)(3) of the Act (47 U.S.C. § 252(e)(3)) to preserve a state's authority to impose unbundling obligations on the incumbent local exchange carriers ("ILECs"). The FCC concluded that the states may impose unbundling frameworks that they deem proper so long as such framework does not conflict with the federal regime. The FCC's discussion of this issue can be found at paragraphs 191 – 196 of the *Triennial Review Order*.

In the FCC's analysis of the State commission's authority to impose such framework under the authority provided pursuant to Section 252(e)(3) of the Act, the FCC focused on the provisions of Section 251(d)(3) of the Act (47 U.S.C. § 251(d)(3)). This section provides:

> [I]n prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order or policy of a State commission that – (A) establishes access and interconnection obligations of local exchange carriers; (B) is consistent with the requirements of this section; and (C) does not substantially prevent implementation of the requirements of this section and the purposes of the Act.

The D.C. Circuit Court of Appeals' Opinion issued on March 2, 2004 deciding various petitions for review of the *Triennial Review Order* (I will refer to this as the "*USTA II Decision*" and will refer to the D.C. Circuit Court of Appeals as the "*Court*") found that the issue of whether the *Triennial Review Order* preempted the state's unbundling regulations was not ripe for review because the FCC had not taken any action on a state's unbundling order. Therefore, the Court also must believe that the state commissions retain some authority to impose additional unbundling obligations on the ILECs.

US LEC asks that there be language in Attachment 2 to the parties' interconnection agreement that sets forth this authority, as provided by Congress and confirmed by the FCC to exist, to impose additional unbundling requirements and ensure that BellSouth must comply with such obligation pursuant to terms, conditions and rates of the parties' interconnection agreement. If this provision were excluded from the language in Section 1.1 of Attachment 2 to the parties' interconnection agreements and BellSouth's proposed language was accepted, BellSouth could claim that, even if this Commission were to require additional unbundling requirements, BellSouth would have no obligation to provide such additional unbundling requirements under the terms, conditions and rates of the parties' interconnection agreement.

Congressional intent and the FCC decision support the inclusion of the citation to Section 252(e)(3) of the Act that preserves the Commission's authority to impose

on BellSouth the obligation to provide additional unbundled network elements, and BellSouth should be required to provide these additional unbundled elements under the terms, conditions and rates of the parties' interconnection agreement.

Q: WHY DOES US LEC WANT TO ENSURE THAT THE COMMISSION'S AUTHORITY IS RETAINED IN CONNECTION WITH ATTACHMENT 2 OF THE PARTIES' INTERCONNECTION AGREEMENT?

A: As I will discuss later in connection with the effect of a possible vacatur of certain of the FCC's decisions in the *Triennial Review Order* and the FCC rules implementing such decisions, US LEC wants to reserve its rights to request this Commission impose additional unbundling requirements so that certain UNEs or combinations of UNEs remain unbundled for purposes of Attachment 2 of the parties' interconnection agreement. US LEC wants to preclude any basis for BellSouth to argue that the Commission has no authority to require continued unbundling of such UNEs or that BellSouth would not be required to make such UNEs available under the terms, conditions or rates of the parties' interconnection agreement. Nor does US LEC want to be viewed as waiving its right to have the Commission make such decision by agreeing to BellSouth's proposed language in Section 1.1 of Attachment 2 to the parties' interconnection agreement.

For example, if the FCC's national impairment ruling in connection with dedicated transport in the *Triennial Review Order*, and the associated rules

implementing this decision were vacated, US LEC suggests that the Commission by its authority under Sections 251 and 252 of the Act, and as set forth in US LEC's language incorporating such authority into Attachment 2, could find that, for purposes of the state of South Carolina, dedicated transport is impaired, and require BellSouth to continue to provide access to such UNEs and combinations of UNEs pursuant to the terms, conditions and rates of Attachment 2. Such action would not be in conflict with any FCC decision or rule or federal regime because none would exist. Such a decision would continue to foster competition, and require that local markets remain open to local competition.

ISSUE A-5: IMPLEMENTATION OF THE VACATUR OF THE FCC'S RULES, IF SUCH VACATUR OCCURS, AND THE RATES, TERMS, AND CONDITIONS THAT APPLY FOR THE TRANSITION OF UNEs OR COMBINATIONS OF UNEs IF NO LONGER REQUIRED TO BE OFFERED UNDER SECTION 251 OF THE ACT.

Q: IS THERE A CONCERN THAT THE FCC'S RULES OR PORTIONS OF THE *TRIENNIAL REVIEW ORDER* WILL BE SUBJECT TO A VACATUR?

A: Yes. In the *USTA II Decision* that I referred to earlier in my testimony, the Court vacated certain decisions of the FCC in the *Triennial Review Order* and rules adopted to implement the FCC's decisions in the Order. The Court stayed the

vacatur of such decisions and rules for a period of 60 days from the date the decision was issued, and a further stay has been ordered for an additional 45 days. Consequently, there is a possibility that certain rules and decisions of the FCC adopted in its *Triennial Review Order* could be vacated on or about June 15, 2004.

Q: WHAT UNEs OR COMBINATIONS OF UNEs COULD BE AFFECTED BY SUCH VACATUR?

A: There are a number of UNEs and combination of UNEs that may be subject to the vacatur. Although US LEC is facilities based provider and has deployed its own switches, the possible vacatur of the rules governing mass market switching, or the so-called UNE Platform or UNE-P, may have some impact on its business plan to provide service to a remote location of one or more of US LEC's existing customers or potential customers. Currently, of greater significance to US LEC is the possible vacatur of access to UNE DS3, UNE DS1, and UNE dark fiber dedicated transport under Section 252(c)(3) of the Act (47 U.S.C. § 252(c)(3)).

Another significant effect of the vacatur is its impact on the availability of UNE DS1, UNE DS3 and UNE dark fiber loops, which I will refer to as "high-capacity loops." US LEC does not believe that the Court vacated the FCC's finding of national impairment with respect to these high-capacity loops or those portions of the FCC rules obligating BellSouth and other ILECs to makes these loops

available as UNEs (47 C.F.R. §§ 251.319(a)(4), (5) and (6)). BellSouth, on the other hand, believes that the FCC's national impairment determination and the implementing FCC rules governing high-capacity loops were vacated. The *USTA II Decision* does not address the FCC's finding that a national impairment existed for high-capacity loops nor does it specifically vacate the rules governing these elements (as it specifically did for mass market switching elements and dedicated transport elements).

In the *USTA II Decision,* it is clear that the Court vacated the subdelegation to the state commissions of decision-making authority over impairment determinations established for mass market switching and certain dedicated transport elements (UNE DS1, UNE DS3, and UNE dark fiber.) The Court also specifically vacated and remanded the FCC's nationwide impairment determinations with respect to such element (*i.e.,* mass market switching and dedicated transport elements). Many ILECs, including BellSouth, have taken the position that the Court's definition of the UNE DS3, UNE DS1 and UNE dark fiber "dedicated transport elements" includes high-capacity loops. US LEC disagrees with such an interpretation, as it is contrary to the plain reading of the *USTA II Decision.* Attempting to subsume "loops" in the definition of "dedicated transport" also is inconsistent with general industry understanding of the distinction between loops and transport, which have always been considered two separate network elements.

In the *USTA II Decision,* the Court's discussion focused solely on whether the FCC's national impairment determination for dedicated transport facilities was appropriate. (The analysis I refer to begins on page 26 of the Slip Opinion issued by the Court, Section II, Subsection B.1. and continues through page 28 of the Slip Opinion). The Court defined "dedicated transport elements as a transmission facilities dedicated to a single customer or carrier." The Court's citations to the *Triennial Review Order*, in its analysis of dedicated transport, are to paragraphs 359 and higher. The FCC analyzed the unbundling requirements for dedicated transport in the *Triennial Review Order* primarily in paragraphs 359 through 418. The FCC's impairment analysis for loops, including high-capacity loops, is found in paragraphs 197 through 358. The Court's analysis of the FCC's decision on its national impairment determination with respect to dedicated transport is void of any references to any of the paragraphs within the *Triennial Review Order* relating to high capacity loops. In the Court's discussions of competitive triggers associated within the granular review of dedicated transport, it sets forth the triggers as to "routes." As BellSouth well knows, the competitive trigger for high-capacity loops was "customer locations." It seems unrealistic that the Court vacated an FCC decision or rule without even the slightest hint that the Court reviewed that portion of the decision or the rule.

Additionally, the phraseology of "transmissions dedicated to a single customer or carrier" has never been included as part of a definition of a local loop of any type (whether a POTS or a high-capacity loop), but rather has traditionally been used

to define dedicated transport to distinguish it from common or shared transport. For example, in FCC Rule 51.319(e)(1) (47 C.F.R. § 51.319(e)(1)) which is subject to vacatur, the definition of "Dedicated DS1 transport" specifically includes the phrase "and are dedicated to a particular customer or carrier;" whereas, the FCC definition of DS1 loops (FCC Rule 51.319(a)(4)(i) (47 C.F.R. § 51.319(a)(4)(i))) does not include this phrase. Similarly, the same distinction exists in the FCC rules for dedicated DS3 transport and DS3 loops and dark fiber transport and dark fiber loops.

More importantly, even BellSouth's definition of dedicated transport uses similar verbiage, i.e. "BellSouth's interoffice transmission facilities, dedicated to a particular customer or carrier that ... uses for transmission between wire centers or switches owned by BellSouth...." (initially proposed language in Section 6.1.1.1 of Attachment 2 subject to this arbitration) But the definition of a local loop BellSouth proposed in Section 2.1.1. of Attachment 2 uses the standard definition of a transmission facility between a distribution frame in a BellSouth central office and the demarcation point at the end user's customer premises.

Loops and transport have always been treated for regulatory local competition purposes as separate network elements. The Section 271 checklist (47 U.S.C. § 271(c)(2)(B) delineates local loops (47 U.S.C. § 271(c)(2)(B)(iv) from local transport (47 U.S.C. § 271(c)(2)(B)(v), and the FCC has consistently analyzed the loops and transports as separate network elements in its Section 251(c)(3) (47

U.S.C. § 251(c)(3)) unbundling evaluations. Loops and transport serve two different functions, and the features associated with the two are quite different.

Nor can one argue that the Court was unaware that loops were a distinct and separate element from transport. In the *USTA II Decision,* the Court also dealt with the appeal of the FCC's impairment decisions in the *Triennial Review Order* relating to loops, such as fiber-to-the-home loops and hybrid loops. I would direct you to the analysis beginning on page 34 of the Slip Opinion, Section III, Subsections A.1. and A.2. In this portion of the decision, the Court makes numerous references to paragraphs 197 through 358 (the FCC's analysis of the loop element). Thus, it is fair to say that the Court certainly understood that loops and transport were two different elements and subject to separate evaluations for purposes of impairment determinations. The ILECs' desire to compress the definitions should not be afforded any consideration.

Certainly, US LEC is not arguing that the subdelegation to the state commission for an impairment determination was not vacated as it applies to high-capacity loops. But, unlike mass market switching and dedicated transport, the Court did not take the second step to examine the FCC's finding of national impairment for high-capacity loops. Thus, the Court did not vacate the FCC's finding of national impairment of high-capacity loops.

Further, the Court dismissed those portions of the ILECs' petition for review that were not addressed, which included a request to review the decision of the national impairment determination for high-capacity loops. Accordingly, the national impairment finding for high-capacity loops remains in effect as does the associated rules implementing the FCC's finding.

Q: WHAT CONCERNS US LEC ABOUT THE BELLSOUTH LANGUAGE ON VACATUR?

A: There are two primary concerns that US LEC has with the BellSouth language. First, as discussed in my testimony on which portions of FCC decisions and rules adopted in the *Triennial Review Order* were vacated, US LEC does not believe that the high-capacity loops rules would be vacated should the stay of the vacatur be lifted. However, under BellSouth's language and procedure, if BellSouth took the position that US LEC could not longer order high-capacity loops under the parties' interconnection agreement and had to convert all the embedded high-capacity loops to either special access circuits or other analogous wholesale services, the 30-day transition period proposed by BellSouth would not provide US LEC with sufficient time to dispute such an assertion. US LEC would be forced to either convert such loops to special access services, or take the risk that the loops would be disconnected. In the event of such a disconnection, US LEC customers would lose service before US LEC could obtain a declaratory ruling from this Commission or the FCC.

Notwithstanding US LEC's position in regard to the high-capacity loops, even if the FCC's national impairment ruling with respect dedicated transport and high-capacity loops and the associated rules were vacated, and as discussed in my testimony on issue A-1, US LEC believes that this Commission has the authority to require BellSouth to continue to provide access to such UNEs and combinations of UNEs as long as such determination does not conflict with the federal regime for unbundling (but as stated if no rules exist, there can be no conflict). US LEC, however, would need sufficient time to exercise its right to request the Commission to make such a finding. Thirty days is insufficient time to do so.

The other concern is that, even if US LEC agreed with BellSouth that certain UNEs were no longer mandated to be made available under Section 251(c)(3) of the Act, the FCC's rules, or pursuant to the Commission's authority preserved under Section 252(e)(3) of the Act, the time period provided by BellSouth to make the conversions or transition is insufficient to ensure that the conversions/transitions are made seamlessly without interruption of service to US LEC customers.

As far as US LEC is aware, BellSouth has not issued or established a procedure for converting the UNEs to special access services. Currently, BellSouth has a conversion procedure for converting special access circuits to UNES, and US

LEC suggests that a similar procedure would be instituted for the "reverse" conversions. For a large number of circuits that require to be converted, a spreadsheet is used, and the conversion is project managed. US LEC understands that the spreadsheets must be reviewed and accepted and then the conversions begin. US LEC understands in some instances it may take BellSouth several months to complete a large number of conversions.

US LEC can only conjecture the number of conversions that BellSouth may have to undertake in the event of the vacatur of the FCC's rules if only dedicated transport is impacted. US LEC also may need BellSouth's assistance in verifying that US LEC and BellSouth agree as to which circuits may be subject to the conversion/transition. BellSouth's records may reflect that a certain circuit is an affected circuit whereas US LEC's review does not so identify it. With the possible strain on the manpower BellSouth has available, such coordination may be difficult to facilitate. Thus, US LEC does not believe that a 30 day period is either practical or realistic.

Further, under no circumstances should BellSouth be permitted to disconnect a service without providing written notice to US LEC that the circuit was required to be converted and was not. There must be an opportunity to cure. As discussed, with the number of circuits at issue, a circuit could be inadvertently omitted or US LEC believe that the circuit was not subject to conversion. A unilateral decision by BellSouth places US LEC's customers at risk, and the companies must

coordinate any conversions and disconnections of circuits to prevent any service interruptions to the customer.

US LEC would propose, then, that a conversion/transition process be implemented similar to the procedure currently utilized by BellSouth today for conversions from special access pricing to UNE pricing. US LEC would agree that once a conversion spreadsheet was submitted, BellSouth could begin billing at the special access pricing for such circuits in the next month's billing cycle.

Q: WHAT TERMS, CONDITIONS, AND RATES DOES US LEC BELIEVE WOULD APPLY TO ANY ELEMENTS THAT WERE NO LONGER CONSIDERED UNEs PURSUANT TO SECTION 251 OF THE ACT, THE FCC RULES, OR THE COMMISSION'S ORDERS?

A: As I discussed earlier in my testimony, even if BellSouth is no longer obligated to make available unbundled network elements pursuant to Sections 251 or 251 of the Act, as an RBOC, BellSouth must still provide access to local loops and local transport (47 U.S.C. §§ 271(c)(2)(B)(iv) and (v)). In an effort to make my testimony less confusing, for this portion of my testimony, I will use the term "271 UNEs" to identify the network elements that BellSouth is obliged to provide access pursuant to Section 271 of the Act, and the term "251 UNEs" to identify the unbundled network elements that BellSouth is obliged to make available pursuant to Sections 251 and 252 of the Act.

In the *Triennial Review Order,* the FCC concluded that Section 271 of the Act imposes an additional obligation on the RBOCs to continue to provide access to 271 UNEs. But the FCC found that the rates at which such access to the 271 UNEs is made are not subject to the rates to be determined by Section 252(d)(1) of the Act (47 U.S.C. § 252(d)(1)) (so-called "TELRIC pricing"). Nor did the FCC find an obligation by the RBOCs to combine the 271 UNEs with 251. I will discuss the requirement to commingle 271 UNEs and 251 UNEs shortly.

US LEC believes that the terms, conditions and pricing for such 271 UNEs should be included in Attachment 2 to the parties' interconnection agreement. The agreement currently incorporates into it, terms, conditions and pricing from BellSouth's tariffs or other contracts between the parties. Because the requirements of 271 are so closely related to 251, and require additional regulatory oversight, US LEC argues that the rates, terms and conditions should remain in the interconnection agreement.

ISSUE A-7: COMMINGLING OF SERVICES, NETWORK ELEMENTS, OR OTHER OFFERINGS THAT BELLSOUTH IS OBLIGATED TO MAKE AVAILABLE ONLY PURSUANT TO SECTION 271 OF THE RULES

Q: WHY DOES US LEC WANT TO REQUIRE COMMINGLING OF UNEs AND COMBINATIONS OF UNEs WITH SERVICES, ELEMENTS OR

OTHER OFFERINGS THAT BELLSOUTH IS OBLIGATED TO MAKE AVAILABLE BY SECTION 271?

A: US LEC is very concerned about the efforts that BellSouth is taking to eliminate any mention of its obligations under 271 in the interconnection agreement. US LEC can only anticipate that BellSouth is taking this position to eliminate any possible oversight of this Commission over its conduct as it relates to services, network elements and other offerings that it makes pursuant to Section 271. Certainly this Commission provides a more expedited forum, when compared to civil court or the FCC, in resolving disputes or preventing BellSouth from taking unilateral action that can harm the reputation and services of a CLEC. Thus, when BellSouth attempts to eliminate this oversight, US LEC becomes suspicious and concerned.

Primarily, US LEC is concerned that commingling of 271 UNEs and 251 UNEs may be more useful in the future, than combinations of 251 UNEs. For example, if dedicated transport is considered a 271 UNE, and not a 251 UNE, but high-capacity loops remain 251 UNEs, US LEC would want to commingle the transport and loop as compared to today's EELs which are combined UNEs. BellSouth has taken a position that for dedicated transport and loops, special access tariffs are the market price "contracts." Although US LEC disagrees with this position, US LEC is concerned that BellSouth may attempt to prevent US LEC from combining wholesale services purchased from the special access tariffs

on the basis that such services, elements or other offerings are made available only due to BellSouth's obligation under Section 271, and, therefore, BellSouth need not permit US LEC to commingle such services, elements or other offerings with 251 UNEs.

Q: DID THE FCC DISCUSS WHAT SERVICES, ELEMENTS OR OTHER OFFERINGS THAT RBOCS ARE REQUIRED TO ALLOW A CLEC TO COMMINGLE WITH 251 UNEs?

A: Not directly. In the *Triennial Review Order*, there are two footnotes that provide some insight on the commingling of 271 UNEs and 251 UNEs. Footnote 1990 initially stated that the FCC "decline[d] to apply our commingling rule, set forth in Part VII.A above, to services that must be offered pursuant to these checklist items."

Footnote 1794 of the *Triennial Review Order* suggests that 271 elements and UNEs and UNE combinations were contemplated by the FCC to be commingled. The footnote, in part, states:

> [A]n incumbent LEC may not deny access to a UNE or UNE combination on the grounds that such UNE or UNE combinations shares part of the incumbent LEC's network with access or other non-UNE services...By eliminating the commingling restriction,

> we will ensure that competitive LECS will be able to obtain all available UNES, UNE combinations, and wholesale services, albeit at the rates established pursuant to tariffs, interconnection agreements or other contracts.

Nothing in the *Triennial Review Order* suggests that commingling of 251 UNEs and 271 UNEs is prohibited.. Nor does it seem rational that we can request to commingle wholesale services obtained from tariffs with 251 UNEs, but are unable to request to commingle such 251 UNEs with 271 UNES that we obtain through contractual arrangements with the RBOCs.

I am also puzzled about how BellSouth would categorize agreements for access to 271 UNEs if not as wholesale arrangements. From US LEC's perspective, an arrangement for services is either retail or wholesale. The FCC requested that RBOCs and CLECs, and BellSouth has offered, to engage in negotiations of a commercial agreement for market-rate access to the 271 UNEs. US LEC would define such agreement as a contract for wholesale services, as it is similar to arrangements US LEC has with other vendors for transport and other similar services that it purchases from BellSouth.

The definition of "commingling" provides for the connection, etc. of a UNE or UNE combination to one or more facilities or services obtained at "wholesale" from an ILEC. Certainly, these "commercial" agreements would not fall into a

category of "retail" (generally more of a carrier to ultimate end user customer relationship), in that such arrangements are similar to other wholesale services that are sold to carriers on volume discount or other basis for further resale to their ultimate end user customer. Again, US LEC finds no support for BellSouth's objection to the commingling of 271 UNEs and 251 UNEs.

ISSUE A-8: WHOLESALE SERVICES OR FACILITIES THAT MAY BE COMMINGLED WITH UNEs AND COMBINATIONS OF UNEs

Q: WHAT DEFINITION OF "COMMINGLING" IS US LEC SUGGESTING?

A: US LEC has proposed to use the definition of "commingling" from the FCC rules, Section 51.5 (47 C.F.R. § – substituting "BellSouth" for "incumbent LEC" and "US LEC" for requesting telecommunications carrier. The FCC definition provides:

> Commingling means the connecting, attaching, or otherwise linking of an unbundled network element, or combination of unbundled network element, to one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale from an incumbent LEC, or the combining of an UNE, or a combination of UNEs, with one or more such facilities or services.

BellSouth has incorporated the FCC's definition verbatim in its FCC No. 1 tariff, Section 2.6 Definitions, Commingling. In this tariff definition, BellSouth has not added the additional language (*i.e.,* inserting "telecommunications" prior to "facilities or services") it now proposes in Section 1.8.1 of Attachment 2 that is the subject of this arbitration. This appears to be wholly inconsistent.

Q: WHAT IS THE DIFFERENCE BETWEEN US LEC'S PROPOSAL AND BELLSOUTH'S PROPOSAL?

A: BellSouth's proposal adds the term "telecommunications" to qualify "services" in the definition. This proposed addition changes the meaning of the FCC definition and narrows the wholesale services and facilities that may be commingled with UNEs and combinations of UNEs.

Q: WHY DOES US LEC BELIEVE THAT THE FCC DID NOT INTEND TO LIMIT THE SERVICES THAT COULD BE COMMINGLED TO TELECOMMUNICATIONS?

A: BellSouth's position is that the FCC has no jurisdiction to require BellSouth to commingle its non-regulated services with regulated services. BellSouth also tried to argue that the "telecommunications" prior to "carrier" in the FCC's rules reflects that only telecommunication services were required to be commingled.

However, as BellSouth well knows, Section 251 applies only to telecommunications carriers, which is a defined term under the Act, and, therefore, for the FCC rules to be valid, the term "telecommunications carrier" is required to be used to designate the requesting entity. It cannot be seen to qualify the services provided by the carrier as telecommunications carriers are not foreclosed from providing an array of integrated telecommunications services, advanced services, information services, and other ancillary services.

The FCC, in its discussion of commingling in the *Triennial Review Order*, uses the term "wholesale services" and gives examples "*e.g.,* switched and special access services offered pursuant to tariff," but at no time states that only "telecommunications services" may be commingled with UNEs and combinations of UNEs. In the discussion of "ratcheting," however, the FCC provides some insight as to what services could be commingled with UNEs or UNE combinations:

> [W]e do note that incumbent LECs shall not deny access to a UNE on the ground that the UNE or UNE combination shares part of the incumbent's network with access services or other non-qualifying services. (footnote omitted). (para. 580)

The FCC further found:

> [T]hat the commingling restriction puts competitive LECs at an unreasonable competitive disadvantage by forcing them either to operate two functionally equivalent networks – one network dedicated to local services and one dedicated to long distance and other services – or to choose between using UNEs and using more expensive special access services to serve their customers. (footnote omitted).

Non-qualifying services are defined in the FCC's rules as a "service that is not a qualifying service." A qualifying service, as defined in the FCC's rules, "is a telecommunications service that competes with a telecommunications service that have been traditionally the exclusive or primary domain of incumbent LECs." (47 C.F.R. § 51.5)

In the discussion of "non-qualifying services," the FCC states "[t]he carrier may use that UNE to provide any additional services, including non-qualifying telecommunications and information services." (para. 143) It also cites to 47 C.F.R. § 51.100(b) ("A telecommunications carrier that has interconnection or gained access under sections 251(a), 251(c)(2), or 251(c)(3) of the Act, may offer information services through the same arrangement…" fn 475).

It further argues that to prohibit the use of UNEs for both qualifying and non-qualifying services:

> [C]ompetitive LECs are providing integrated telecommunications and information service offerings in direct competition with the incumbent LEC provision of these services. (footnote omitted.) Moreover, such a rule may prohibit the packaging of services that would be considered advanced telecommunications capabilities, but are not telecommunications services themselves, thus conflicting with the goals of the Act. (footnote omitted.)

Based on discussions within the *Triennial Review Order*, there is no support for BellSouth's contention that only "telecommunications" services are subject to commingling. Certainly, the FCC has jurisdiction over information services and has the authority to require BellSouth to commingle such services with UNEs and UNE combinations

Q: DOES THIS COMPLETE YOUR DIRECT TESTIMONY?

A: Yes.